No. 11100

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM A. PORTER and SAMUEL S. TAYLOR,
Appellants,

vs.

AMERICAN MAIL LINE LTD., a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF AMICI CURIAE

JOHN GEISNESS,
BASSETT & GEISNESS,
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INTEREST OF AMICI CURIAE

Amici curiae represent the licensed personnel of the SS "CAPILLO" on the voyage involved in the instant case, excepting only the captain and the chief engineer. The rider attached to the shipping articles applies, of course, to the licensed personnel as well as to the appellants and other unlicensed crew members. The appellants were repatriated at an earlier date than other crew members. The licensed crew members represented by amici curiae, finding the instant suit pending when they returned, have held their claims in abeyance because, unless new facts unexpectedly develop or the decision on appeal rests upon some theory not now within our contemplation, the

outcome of this case should determine their right to bonus for the period of their imprisonment. At the very least, the licensed personnel have a direct and substantial interest in the pending appeal.

STATEMENT OF THE CASE

The case before the court has been stated by both appellants and appellee. We will not restate it in full, but will set forth only those matters that we consider necessary to a connected argument and as to which a ready reference in this brief may be a convenience to the court.

The articles of the SS "CAPILLO" signed October 11, 1941, bore an attached rider containing three sentences upon which the present case hinges:

> "The American Mail Line agrees to pay an emergency war bonus to the crew of the S.S. Capillo, Voyage Six (6), in accordance with the provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various Marine Unions.
>
> "In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and bonus to the date members of the crew arrive in an United States port, on the Pacific coast; furthermore, the company agrees, in such event, to arrange for repatriation of such men to a United States port on the Pacific Coast.
>
> * * * * * * *
>
> "It is further agreed that in the event of any

increase in pay, overtime or war bonus or changes in insurance which may be granted, as the result of negotiations between the Union and the Pacific American Shipowners' Association, the company will be governed by the terms and effective date of any agreement so reached."

In the course of the voyage the crew was imprisoned for war causes and the crew members ask that the bonus be paid to them to the date they arrived in a United States port on the Pacific Coast. A glance at the second sentence of the rider would appear to confirm unqualifiedly their right to the bonus for such period, but the appellee has contended throughout the case that the second sentence must be read with the first and third sentences quoted above and in the light of negotiations, agreements and decisions preceding and subsequent to the execution of the articles, and that when so read appellants should be found entitled to bonus only until destruction of the ship December 29, 1941.

Appellants urge that attention should be confined to the rider itself, but for the sake of this argument we will assume that all of the evidence admitted by the trial court was properly admitted, believing that the total effect of such evidence is to confirm the right asserted by the crew members to war bonus throughout their period of imprisonment.

The form of the rider involved in this case was first used in August, 1941 (Aps. 105). It was proposed by the unions representing the various categories of personnel on American Mail Line ships and accepted by the American Mail Line (Aps. 106).

Thus, while the articles with the rider constitute a contract between each individual crew member and the ship operator, the rider was concurred in by the collective bargaining agents of the employees. Apparently the unions directly participated upon each occasion of its use (Aps. 109).

At the time the rider was developed there were in effect agreements between the Pacific Coast unions and the operators, referred to as supplementary agreements, treating specially with adjustments in compensation of seamen to meet the impact of war conditions upon the nature of the seamen's calling. As emphasized by appellee, these supplementary agreements not only were not uniform but were deemed insufficient by seamen of all categories, and hence, the unions demanded and the American Mail Line agreed that aside from such supplementary agreements there should be incorporated in the contract between individual crew members and company, evidenced by the shipping articles, the special stipulations found in the rider.

The last Pacific Coast supplementary agreements entered into prior to October 9, 1941, by unions representing unlicensed personnel were dated May 19, 1941 (Aps. 132-133). The latest Pacific Coast supplementary agreements applicable to licensed personnel prior to October 15, 1941, were dated August 16, 1941 (Aps. 166-167). Between October 9 and October 16, 1941, each of the several Pacific Coast maritime unions entered into a separate supplementary agreement with the operators (Aps. 133). The agreements reached between the operators and the unions repre-

senting the appellants were entered into on October 9 and October 10.

It is said that the agreements of October 9 and 10 were not known to the parties to the instant case when the articles of October 11, 1941, were signed (Appellee's brief, p. 24). On the other hand, there was no basic change in the situation and nothing to compel the conclusion that the rider would not have been appended to the articles had the parties known of those general agreements. There was a difference of degree in that the October agreements granted additional benefits and reached further toward achieving uniformity, although appellee does not contend that even substantial uniformity was achieved as to all United States seamen until December, 1941 (Appellee's brief, p. 26). Too, the appellee brings out that the October agreements for the first time expressly dealt with the subject of payment of war bonus to unlicensed personnel after discontinuance of a voyage due to war causes. The prior supplementary agreements with unlicensed personnel failed to deal expressly with the subject, but the August 16, 1941, agreement with licensed personnel did so (See Aps. 146, 216; Resp. Ex. B) and the licensed personnel nevertheless continued to demand and secured the attachment of the rider, applicable as well to them as to other crew members.

The general situation developed by the record respecting the Pacific Coast unions and their members was that for long prior to October 11, 1941, and to and including that date there were effective successive supplementary agreements, each generally ap-

plicable to the membership of a particular Pacific Coast maritime union, and that when it developed that the benefits accorded by the effective supplementary agreements were not sufficient to induce seamen to man the ships of the American Mail Line, the prospective crew members with the assistance of their unions entered into a special agreement evidenced by rider attached to the articles, giving the benefit of future collective agreements with certain independent guarantees. It cannot be said that the October agreement brought any essential change in the situation, even if we indulge, as we should not, appellee's assumption that the rider contemplated and was conditioned upon some expected agreement that would work a basic change.

Certain of the provisions of the October agreements should perhaps be quoted here because we sharply disagree with the appellee's interpretation of that portion of the October agreements relating to the payment of war bonus after discontinuance of a voyage due to war causes. So far as concerns the present argument, the October agreements were alike (Appellee's Brief, p. 52). A sample October agreement is set forth in the appendix to appellee's brief and also in Apostles on Appeal, pages 119 to 126. In numbered paragraph 1(a) of the agreement, war zones are established:

> "1. The following war bonus rules shall govern the parties hereto—
>
> "(a) There shall be five war zones; namely:
>
> "I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coast of Africa, Red Sea,

Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States ports via Indian and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th. Meridian eastbound, and thereafter no further bonuses will be payable.)

"II. Trans-Atlantic voyages to Russian (Archangel, etc.) (Whole voyage).

"III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th. Meridian westbound, until recrossing the same Meridian east bound.)

"IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound.)

"V. Canada (Atlantic Coast). (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port)."

In numbered paragraph 1 (b) general provision is made for payment of war bonus:

"(b) Members of the Union shall be paid a war risk bonus at the rate of $80 per month in the first four areas and $33 in the fifth area provided, however, that all members of the Union entitled to receive basic wages in excess of $120, shall, in lieu of the bonuses specified above be paid at the rate of 66 2/3% of the basic monthly wages in effect on the date hereof in the first four areas and 25% of the basic monthly wages in effect on the date hereof in the fifth area . . . "

In numbered paragraph 4, the matter of compen-

sation after discontinuance of a voyage due to war causes is specifically treated:

> "In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein."

Following the October agreements and at varying dates, certain further agreements were reached by the Pacific Coast unions and shipowners (Aps. 134) but these were basic agreements, providing increases in basic pay and not directly relating to war bonuses.

After the United States became at war, the unions and operators of both coasts agreed that a Maritime War Emergency Board should settle all questions in dispute between the maritime unions and operators and that its decisions should be final and binding (Exhibit K, Aps. 199-206).

Decision No. 2 of the Board classified war risk voyages and increased the bonus rate. It contained no provision respecting payment during internment (Exhibit A-10, Aps. 270 et seq.).

A succeeding decision numbered 5, as amended February 17, 1942 (Exhibit A-12, Aps. 287 *et seq.*) provides for payment of bonus after loss of a vessel during exposure to marine perils. Decision No. 5,

with its amendments, was consolidated into Decision No. 5, revised, issued February 21, 1942 (Exhibit A-11, Aps. 280). This decision of the Maritime War Emergency Board was by its terms:

> "retroactive to December 7, 1941, in all cases where there was no agreement with respect to the making of payments provided for herein contained in ships Articles entered into on or before —— February 21, 1942, with respect to payments provided for in Article 6 hereof or collective bargaining agreements in effect at the time when ship's articles were entered into as aforesaid, or where the making of such payments were expressly left open subject to later agreement either in the ship's articles or such collective bargaining agreements."

Article 6 pertained only to the subject of the continuance of war bonus payments after loss or internment of a vessel. These decisions do not expressly say that bonus shall *not* be paid during imprisonment.

Upon repatriation, appellants were paid by appellee war bonus of $80.00 per month to December 29, 1941, the date the ship was lost. Appellee very evidently paid on the assumption that the October agreements applied both as to amount and period and did not authorize payment for any period following loss of the ship. Later, in excepting to the original libel appellee urged that the board's decisions could not apply, and the proctor for respondent stated at the opening of the trial (Aps. 81):

> "It is further stipulated that if the libelants are entitled to recover, each is entitled to bonus at the rate of $80.00 per month. It is also agreed

that the libelants have been paid their wages and emergency increase during the entire period until their arrival in New York; that they have been paid overtime; that they have been paid an attack bonus as provided in the supplemental agreements.

"It is also agreed that they were paid war bonus from the time the vessel crossed the 180th Meridian westbound, in accordance with the supplemental agreements in effect then, until the date when the vessel was sunk in Manila Harbor, December 29, 1941." (Aps. 81)

Appellee did not pay bonus for the period of the repatriation voyage on the "GRIPSHOLM". This would also seem to reflect its theory that the October agreements apply and its interpretation of those agreements. Appellee indicates that this payment was withheld on the ground that by reason of international protection travel on the "GRIPSHOLM" did not involve war risk, but it must be said that this suggestion is scarcely credible in view of its position in paying off and before the trial court. On the face of it, it is much more reasonable to assume that nonpayment was prompted by appellee's theory as to the interpretation and application of the October agreements.

The trial court added bonus for the repatriation voyage and increased the rate of bonus to $100.00 per month, the amount fixed by the Board's decisions.

It may fairly be said that the appellee's conduct respecting war bonus up to the time of this appeal was consistent with the theory that the October agreements, not the Board's decisions, applied both to

determine the rate of bonus and the period for which it should be paid. The trial court applied the Board's decisions to fix the bonus rate and period for which it should be paid.

SUMMARY OF ARGUMENT

If possible, every part of the contract should be given effect, all parts should be made to harmonize and no part should be rendered superfluous. General clauses are subordinate to special clauses. Under these rules, there was an unchanging commitment to pay war bonus throughout the period of imprisonment. No collective bargaining agreements were intended to, nor could they, subtract from this commitment.

ARGUMENT

Basic Aids to Construction and Their Application to this Case

Beginning at p. 56 of its brief, appellee states, with supporting authority, the general rule that the main purpose of the parties should, if possible, be followed in construing a contract. We agree as to the general proposition, but disagree as to the main purpose and meaning of the rider in question. It is our contention that the main purpose and meaning of the rider was to assure to the crew members war bonus payments throughout any period of internment or imprisonment at rates fixed by applicable supplementary agreements in effect when the rider was signed, together with *increases* later accorded by negotiation. We will shortly discuss the circumstances which we

believe give rise to this interpretation, but will first discuss certain recognized aids in the construction of contracts that also guide us to the same meaning.

It is well established that all parts of a contract are, if possible, to be given meaning and no part is to be treated as surplusage. In *Ladd v. Ladd*, 8 Howard 10, 12 L. ed. 967, the court said:

> "By every sound rule of construction, an instrument should be interpreted by the context, so as if possible to give a sensible meaning and effect to all its provisions; and so as to avoid rendering portions of it contradictory and imperative, by giving effect to some clauses to the exclusion of others."

In *E. I. Dupont de Nemours & Co. v. Claiborne-Reno Co.*, 64 F.(2d) 224, 89 A.L.R. 238, the Circuit Court of Appeals for the Eighth Circuit said:

> "If possible, a court will give effect to all parts of an instrument and a construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable."

See also:

The Nicholson Pavement Co. v. Jenkins, 81 U.S. 452, 20 L. ed. 777;

Burdon Central Sugar Ref. Co. v. Payne, 167 U.S. 127, 42 L. ed. 105;

Sattler v. Hallock (N.Y.) 54 N.E. 667;

Stone v. Robinson (Tex.) 180 S.W. 135;

Andrew Jergens Co. v. Woodbury, Inc., 273 Fed. 952, 959, Affirmed 279 Fed. 1016, Cert. Den. 260 U.S. 728, 67 L. ed. 484;

Hammett Oil Co. v. Gypsy Oil Co. (Okla.) 218 Pac. 501, 506;

Williston on Contracts (Rev. Ed.) Sec. 619, p. 1781;

Page on Contracts (2d Ed.) p. 3525, Sec. 2040;

12 Am. Jur., p. 772, Sec. 241.

The foregoing rule of construction takes all force from appellee's argument that the rider incorporated that part of the October agreements prescribing the period during which war bonus should be paid, thereby negativing the right to war bonus during periods of internment, under appellee's interpretation of the October agreements. One trouble with that argument is that it renders the second sentence of the rider meaningless. Appellee will respond that the parties did not know of the October agreements when the rider was signed and, therefore, did not know they were using a meaningless sentence in the rider. However, this will not hold water because the preceding supplementary agreements likewise contained no specific provision for payment of war bonus during internment and, therefore, according to appellee, did not authorize such payment (see appellee's brief, p. 44), so we would reach the same result by incorporating the prior May agreements. Further, when appellee argues that the first sentence of the rider incorporates in full future agreements, (Appellee's brief, 34), it plainly writes out the last sentence.

Another reasonable and well established rule of construction is that where a contract contains one

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Another reasonable and well established rule of construction is that where a contract contains one

clause particularly relating to a specific subject matter and also contains a general clause dealing with several matters including the subject matter of the specific clause, the general clause will be subordinate to the specific clause. In 12 Am. Jur. p. 779, sec. 244, this rule is well stated:

> "As a rule, where in an agreement there are general and special provisions relating to the same thing the special provisions control. When the parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent, whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought."

Mutual Life Insurance Co. v. Hill, 193 U.S. 55, 48 L. ed. 788, a case arising from the District of Washington, dealt with a question bearing a close analogy to the instant case. There a life insurance policy contained express provision that the company assumed no responsibility for notice to policy holders of premiums due. The policy also contained a provision that the contract should be held and construed at all times and places to have been made in the City of New York. A statute of New York forbade forfeiture of any life insurance policy without notice. In holding that the specific clause of the contract was the controlling clause, the Supreme Court said:

> "The ordinary rule in respect to the construction of contracts is this: That where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general

in its terms, although within its general terms the particular may be included. Because, when the parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent; whereas a reference to some general matter within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought. Here, when the parties stipulate that no other notice shall be required, attention is directed to the particular matter of notice. When the stipulation is that the contract shall be construed to have been made in New York, no particular statute is referred to, and the attention may not be directed to the matter of notice or any other special feature of New York law. The special controlled the general; that which must have been in the minds of the contracting parties controls that which may not have been, although included within the language of the latter stipulation. This is the general rule in the construction of all documents — contracts as well as statutes."

See also:

Thomas v. Matthieassen, 232 U.S. 221, 58 L. ed. 577;

Vol. I, American Law Institute Re-Statement, Contracts, Sec. 236;

Williston on Contracts (Rev. Ed.) Sec. 619, p. 1784, n. 12.

Here, the rider specifically provides that "in the event the * * * crew be * * * imprisoned * * * the company agrees to pay bonus to the date members of the crew arrive in a United States port, on the

Pacific Coast." This provision of the rider specially dealing with the single subject matter plainly dominates as to that single subject matter the general clauses incorporating, by reference, terms of other agreements.

This is an appropriate place to speak of *Minnesota Tribune v. Associated Press* (C.C.A. 8) 83 Fed. 350, a case relied upon rather strongly by the appellee. That case involved a contract containing in its seventh paragraph a provision that "the rights, duties, and obligations of the parties hereto, except as hereinbefore specially provided for, shall be controlled and governed by the by-laws of said party of the first part, now or hereafter in force during the life of this contract". By reason of this particular form of language, the court said that "the necessary effect of this provision of the contract was to make the subsequent provisions thereof, including the ninth paragraph, subordinate to the by-laws". The sense of the decision is that the parties, by excepting specific provisions occurring *before* the seventh paragraph, said in effect that the by-laws would control even specific provisions of the contract occurring after the seventh paragraph. Were this not the sense of the decision it would, of course, be contrary to the well established rule we have just discussed. We hardly think the court was ignorant of that basic rule of construction and certainly indicated no intention to set it aside, but rather considered the case to be one to which, by reason of the special language we have quoted, the rule did not apply.

True Meaning of the Rider

It is the substance of appellee's contention, as we read its brief, that the rider in question was conceived in anticipation of general agreements that would accord satisfactory adjustments in war compensation, would be uniform in their application, and would deal directly with compensation during imprisonment or internment, and that the rider was designed and intended to incorporate the whole of such general and uniform arrangements regardless of conflict with the specific provision of the rider upon which appellants base their case. As we have shown, this argument runs foul of basic established principles that should govern the interpretation of contracts. Furthermore, entirely aside from those principles, appellee's inference from the circumstances as to the meaning of the parties is not reasonable.

The appellants, their fellow crew members and crew members previously signing articles bearing the rider in question were departing to be in war zones exposed to unusual hazards for undetermined periods. They knew that there were general contracts in effect between their respective unions and the American Mail Line providing certain compensation for war risks. They were dissatisfied with the compensation so provided and were unwilling to sail without assurance of greater benefits. They knew, too, that negotiations were almost continuously being conducted between the unions and the ship operators, that a series of special and general agreements had been reached and that further agreements would no doubt be reached in the future. As we read the rider, they

met the situation as one would naturally expect, by demanding (1) that they be paid war risk compensation in accordance with the applicable supplemental agreements in existence at the time they signed the rider (first sentence of rider); (2) that no matter what agreements had been or might be made they be paid wages and bonus during any period of internment or imprisonment (second sentence of rider); and (3) that in the event wages or war bonus should be increased, the increases would be applicable to them (last sentence of rider). They did not intend to limit themselves to the war compensation accorded by existing agreements, nor did they intend to place themselves subject to all the provisions of whatever future agreements might be made. They would not sail without being assured that they would be paid wages and bonus during any period of imprisonment and that they would not be subject to any decrease in bonus or wages but only to increases.

It will be noticed that this interpretation gives a distinct meaning to each of the three sentences under scrutiny and gives force and effect to the specific provision for bonus payments during imprisonment in spite of the general references in the other two sentences to independent collective agreements.

We submit that the interpretation we urge is the only sensible interpretation that gives effect to all parts of the rider. Appellee's argument hopelessly fails to do so. It is argued by Appellee that the phrase "applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various marine unions," as used in the first

sentence of the rider, refers not only to those in existence at the time the articles were signed but to those that might come into existence in the future. (See pp. 32 to 38 of appellee's brief). It is at once apparent that this interpretation denies meaning to the last sentence of the rider. Further, the necessary, and apparently the intended, import of appellee's argument is that the rider supplanted itself by existing and future agreements (See pp. 32-38 and 71-72 of appellees' brief). This construction plainly writes the second sentence out of the rider.

In this connection, it must be remembered that none of the May, August and October agreements expressly provided that no bonus should be payable for periods of imprisonment ashore. Appellee does not contend otherwise but argues that none of those agreements provides for such compensation and for that reason it is not collectible under any of them. It follows that, since all agreements, according to appellee, deny war bonus during imprisonment in a like manner, incorporation into the articles of any of the agreements would, if we follow appellee, deny war bonus during periods of imprisonment ashore, so that the second sentence of the rider, if appellee is right, never had nor could have force.

The basic defect in appellee's argument is that it assumes that appellants must adopt all or none of the provisions of supplementary agreements. It is baldly asserted by appellee on p. 72 of its brief that it is "wholly untenable" to apply the increased rate of compensation found in the supplementary agreements without applying all of the other pro-

visions of those agreements and excluding the rider. On the contrary, it is not only tenable to do so but it is the only tenable thing to do. Otherwise, we must assume that by accepting the supplementary agreements in the first sentence of the rider they would necessarily have barred themselves from taking the benefit of the second sentence, even had the October agreements, unknown to them October 11, 1941, never been adopted. For this and for the other reasons we have already discussed, it seems very clear that what the parties meant to do and what they did do was provide that the crew members should be paid in accordance with current supplementary agreements; that in addition to any stipulations in the supplementary agreements they should be paid bonus during internment; and that they should have the benefit of any increases in bonus accorded by subsequent agreements.

And assuming that appellee can reconcile with its argument any theory under which the second sentence of the rider ever had or could have any meaning at all, its argument necessarily implies that when the crew of the "CAPILLO" signed articles containing the express stipulation that war bonus should be paid to them throughout any period of internment despite the failure of existing collective bargaining agreements to provide such compensation during such periods, they were also agreeing that if in a day or a week or a month or a year another collective bargaining agreement should be reached containing some increase in rates but likewise denying bonus during imprisonment, the specific protective clause they had

insisted upon in the rider would be out of the window and they would be entitled to no bonus during imprisonment. After all, what we are ultimately interested in is the intention of the parties and specifically the intention and understanding of one party which must have been comprehended by the other. It seems too plain for argument that the crew could not possibly have intended any such possibility and that the American Mail Line must have known well enough that there was no such intention. The crew members believed that, come what might, they would be entitled to bonus during imprisonment at current or increased rates. They confidently computed their bonus during imprisonment and have now been told that by reason of a wholly artificial and untrue implication gratuitously drawn from a general background of collective negotiations and agreements, they are to be denied that which they required to be specifically promised them as a condition of their sailing.

The appellee's whole argument rests upon the assumption that the articles bearing the rider were signed in contemplation of some uniform and satisfactory general agreements by which the crew expected to be bound. The October agreements are acclaimed by appellee as those for which seamen had been waiting and it is concluded that the intention of the rider was to adopt every part of those agreements and discard inconsistent stipulations in the rider. It is said that "the 'general' intent of the rider to the shipping articles of the CAPILLO was clearly to serve as an interim document until applicable supplementary agreements covering the subject mat-

ter should be negotiated which would thereafter govern (98, 154). Such October supplementary agreements were negotiated, by the terms of which the situation here presented was fully covered."

There is nothing to support appellee's assumption as to the general intent of the rider. The very apparent intent was to secure wages and bonus at the going rates, together with future increases, and to have both wages and bonus during any period of imprisonment.

Meaning of the October Agreements

Appellee contends that the October agreements negative the right to bonus during imprisonment. This is said to be true because the October agreements provide that bonus shall be paid while in the defined war zones and the term "war zone" is taken by appellee to mean only a "voyage" in certain waters, so that when the voyage ends with loss of the vessel, the war zone ends. This interpretation is plainly open to objection because the agreement does not in any sense say that a zone is a voyage but says, in substance, (Par. 1 (a) that respecting a voyage of the type here in question, the vessel is in a war zone after crossing the 180th Meridian westbound until re-crossing the same meridian eastbound. The agreement next (Par. 1 (b) provides generally that bonus shall be paid at stipulated rates in the "areas", and in an entirely separate paragraph (Par. 4) provides:

> "In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective

bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein."

It is at once apparent that if appellee's interpretation of the second quoted sentence is correct, the sentence is nugatory. It would mean no more than to say that crew members should be entitled to bonus while in one of the war zones and in the course of the voyage. Exactly that much, at least, had already been said in the earlier provision of the contract to which we have already referred. In view of the existence of that prior provision and also in the light of the paragraphing and context, it is crystal clear that the quoted paragraph was intended to apply to those cases in which a vessel discontinued a voyage as a result of war operations. Applying appellee's interpretation, the second sentence of the quoted paragraph is a promise that the operators, for periods following discontinuance of voyages, will pay war bonus during continuance of voyages. Of course, the common sense interpretation of the October agreements is that on voyages into certain areas, the war bonus will be paid, and that in the event such a voyage is discontinued, the seamen will be paid war bonus while in those areas in which a crew, if voyaging therein, is entitled to bonus. The rider goes a relatively small step further to assure bonus until return to the Continental United States.

Appellee attempts to show the difficulties of applying such an interpretation by pointing out that the appellants did not return westbound across the 180th Meridian and, therefore, never literally left the area (p. 43 of appellee's brief). This type of argument is perhaps best answered by pointing out that similar difficulties of interpretation may be encountered in connection with westbound voyages that continue westerly into non-bonus waters. We believe the authors of the October agreements would probably respond that while their agreements might be more precise in their definition of war zones, the possibility that a crew might receive bonus while in a certain location provided they approached it from one direction rather than another is an unreasonable conclusion that it should be possible to dispel by common sense interpretation without its being literally treated in the agreement.

And, as we have already argued, even if appellee's interpretation of the October agreements respecting payment during imprisonment were correct, the outcome of this case could not be affected, because no matter what provision may be contained in the supplementary agreements, the rider insures to the men payment of bonus during such periods.

Decisions of Maritime War Emergency Board

The assumption of the court and the argument of appellee (on appeal only) is that the decisions of the Board were negotiated agreements because they stemmed from a collective agreement that the decisions should be binding. It follows that if our argument is valid that the rider insures bonus during

imprisonment no matter what agreements may subsequently be made, that argument is equally valid as applied to the decisions of the Board. If they enter the case at all, they enter it as agreements and have no independent force.

In addition, it appears that the critical decision, Decision No. 5, revised, was not, by its terms, to be effective as to the voyage in question. It was declared to be retroactive to December 7, 1941 in certain cases. While the provision of the decision relating to effective dates is rather involved, the apparent meaning, so far as material here, is that with respect to Article 6, the part pertaining to war bonus payments after loss or internment of a vessel, the decision was to be effective as of December 7, 1941 in cases where neither ships articles entered into on or before February 21, 1942 nor collective bargaining agreements in existence when such articles were entered into contained provision respecting payment of war bonus after loss of the vessel, or where either the articles or the agreement expressly provided that the making of such payments should be left open for later agreement.

We understand that appellee's interpretation of the above-mentioned part of the decision pertaining to the effective date is in accord with what we have just said as to our own. Appellee proceeds to argue that this case falls within the very last clause of the provision because, according to appellee, "the making of such payments" was "expressly left open subject to later agreement . . . in the ships articles." This argument is unsound. The ship's articles left partially

open for adjustment (upwards only) the *amount* of the bonus but did not leave open the "making of such payments". Furthermore, Article 6, the clause claimed by appellee to be retroactive under the provision we have mentioned, does not relate to the *amount* but only defines the periods during which bonus shall be payable after discontinuance of a voyage due to war causes, which makes it clear that when reference is made to "*the making of such payments*" being left open, the Decision does not deal with a case where the *amount* was left open but deals only with cases where the *right* to bonus following loss or internment of the vessel, irrespective of *amount*, was expressly left open, the *right* to bonus under those conditions, not the *amount*, being the subject matter of Section 6.

It is certainly beyond argument that the *right* to bonus after loss, destruction, or abandonment of the vessel was not expressly left open. Quite the contrary was true.

Finally, it has been said by the Supreme Court that if there is doubt as to the meaning of a contract, the practical construction placed upon it by the parties "is an aid that may always be called in" (*Steinbach v. Stewart*, 78 U. S. 566, 20 L. ed. 56), is "of weight" (*U.P.R. Co. v. Hall*, 91 U.S. 343, 23 L. ed. 428), is "always a consideration of great weight" (*Brooklyn Life Insurance Co. v. Dutcher*, 95 U.S. 269, 24 L. ed. 410).

In Williston on Contracts (Rev. Ed.) sec. 623, p. 1792, the author says:

"The interpretation given by the parties them-

selves to the contract as shown by their acts will be adopted by the court, and to this end not only the acts but the declarations of the parties may be considered."

See also Page on Contracts (2d Ed.) Sec. 2034, p. 3510; 12 Am. Jur. Sec. 249, p. 787; and *City of Chicago v. Sheldon*, 76 U.S. 50, 19 L. ed. 594, where the court said that the practical construction by the parties of an ambiguous contract is entitled to great, if not controlling, influence.

At the time appellants were paid off by appellee, appellee rejected the applicability of the Board's decisions, took the same position in this cause by contending, in support of exceptions to the original libel, that appellants could base no rights upon the decisions of the Board, and finally stipulated that if appellants recovered, their recovery should be limited to the $80.00 per month provided by supplementary agreement, not the $100 per month fixed by Board decisions and awarded by the trial court. Upon this appeal appellee half heartedly advances the contrary view but in doing so obviously is inspired by the decision of the trial court and its independent construction was plainly indicated by words and conduct to be that the Board's decisions have no application.

Collective Bargaining Agreements Do Not Negative More Advantageous Provisions of Shipping Articles

A discussion of this subject is invoked by appellee's reference to *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 88 L. ed. 762. While appellee's position on the point is not clearly made and it perhaps does not intend

to argue that the crew members can in no event have more than collective bargaining agreements accord them, such a position is at least intimated on pp. 67 and 68 of appellee's brief, and for that reason, we think the point merits discussion.

In the *J. I. Case Co.* decision, the Supreme Court held that an individual agreement, inconsistent with a collective bargaining agreement and amounting to an unfair labor practice, could not be made. The language of the opinion admits the possibility that an individual employee may be denied benefits under individual agreement greater than those accorded by the collective agreement. However, the court is careful to state that such a result is not necessarily the case. This phase of the court's opinion is discussed in an able annotation in 88 L. ed. 770 where the author says, at p. 787:

> "Whether an individual employment contract is valid or invalid to the extent that it contains provisions more favorable to the employee remains an open question. See J. E. Case Co. v. National Labor Relations Bd. (reported herewith), where the court pointed out that it was not called upon to decide that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, and said: 'Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the law of contracts applicable, and to the Labor Board if they constitute unfair labor practices'."

Aside from the above-quoted comment, it should be

remembered here that the rider in question is not merely an individual bargain but, as appellee itself states in its brief, (p. 64) was brought into existence by the unions, the collective bargaining agents. It was no less the result of collective bargaining than were the more general supplementary agreements. Thus, while the shipping articles, which include the rider, constitute a several contract with each seaman (*Oliver v. Alexander*, 6 Pet. 143, 8 L. ed. 459; *Peninsular & Occid. SS Co. v. N.L.R.B.*, 98 F.(2d) 411, Cert. Den., 305 U.S. 653, 83 L. ed. 423), they also evidence a collective bargain.

In addition to the foregoing, and whatever rule may be applicable to individual contracts in other employment relations where collective agreements also exist, it seems plain that in the light of 46 U.S.C.A. 564, no collective agreement may derogate from the rights of a seaman under shipping articles. Under 46 U.S.C.A. 564, the contract of employment of seamen must be in writing, as near as may be in the form prescribed by statute, must be signed by the master before any seaman signs the same and must provide, among other things, the amount of wages each is to receive. In short, seamen must serve under shipping articles which must stipulate the amount of their wages. In the light of this statute, the court, in the *Peninsula & Occid. Ss. Co.* case, *supra*, said:

> "Not only would the company have the right to make individual contracts, evidenced by the shipping articles but was required by law to do so."

We submit that a steamship operator may not in reliance upon a collective agreement not expressly incorporated in the shipping articles pay wages less than those stipulated in the articles.

Thus, we return ultimately to the meaning of the rider. If the rider meant, as we respectfully urge that it did mean, that the members of the crew were to receive bonus during imprisonment despite what collective agreements might provide, they are not to be deprived of this advantage no matter what interpretation may be placed upon the October agreements and the decisions of the Maritime War Emergency Board.

CONCLUSION

The crew of the "CAPILLO" joined the vessel in reliance upon an express and unqualified stipulation that they would be paid war bonus for periods of imprisonment following loss or destruction of the vessel. They suffered under long periods of imprisonment by the Japanese under conditions that have been graphically described to us all. Money cannot compensate for the suffering they underwent but, in terms of money, it would require incomparably more to compensate them for their imprisonment than for shipboard life and duties. They, of course, counted upon the express stipulation in the rider, and during their long suffering in prison camps derived some distraction and solace from thought of their accumulating wages and bonus and from computing the amounts accruing to them. Now to tell them, as appellee has, that for elaborately involved reasons

they are not to be paid what in plain language was promised them, is, we respectfully submit, to do a very shocking thing. It is not merely that one's sympathies are naturally aroused by the plight of the surviving members of the crew and their families, but it instantly springs to mind that law justifying such a result is a shockingly poor kind of law. We believe the very fact that the crew members would naturally expect to be paid the bonus during their imprisonment, entitles them to such payment. Construction of contracts is not an artificial process but is merely the process of arriving at the meaning the parties must have assumed the contract to have. Anyone, including appellee, would certainly believe that the crew would expect bonus during imprisonment and that is the basic reason they are entitled to it.

Respectfully submitted,

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